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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents NBC Universal, Inc. and NBC Universal Television Studio ("NBCU") respectfully submit that this Court should deny the petition for certiorari filed by Petitioners Clifton Mallery a/k/a Enjai Omaa Eele and Amnau Karam Eele ("Petitioners") for the reasons outlined below.

JURISDICTION

The judgment of the Court of Appeals was entered on June 3, 2009. Petitioner filed a Petition for Re-Hearing *en banc* on June 17, 2009, which was denied on August 19, 2009. The petition for writ of certiorari was filed on November 17, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 331 Fed. Appx. 821 (2d. Cir. 2009) and reproduced in the Appendix at A. The opinion of the district court is comprised of two unreported rulings: the first, issued December 3, 2007, is reproduced in the Appendix at F, and the second (awarding prevailing party attorneys fees), issued on March 18, 2008, is reproduced in the Appendix at C.

PRELIMINARY STATEMENT

Petitioners' petition for writ of certiorari fails to present either a split in the Circuit Courts or an important issue of federal law that requires this Court's review of the decision below. The Court of Appeals simply affirmed the grant of summary judgment dismissing Petitioners' copyright infringement claim based upon a careful comparison and analysis of the parties' respective works by the district court, under the applicable standards. The cases Petitioners cite as creating a Circuit split merely reached different results, on different facts, under the self-same standard.

Petitioners also argue that the district court granted summary judgment "without notice", and that it was error for the Court of Appeals to affirm, presumably referring to the conversion of Respondents' motion to dismiss into one for summary judgment. The Court of Appeals properly held that specific notice is not required where appellant should reasonably have recognized the possibility that the motion might be converted, and was not taken by surprise or deprived of reasonable opportunity to meet facts outside the pleadings. Here, because the motion was decided by reviewing only materials referenced in the pleadings (the allegedly infringed and infringing works), Petitioners were not deprived of an opportunity to meet facts outside the pleadings. The law on this point is clear and settled, and Petitioners have not raised an important issue of federal law or identified a Circuit split in connection with this or any other issue.

COUNTERSTATEMENT OF THE CASE

A. Factual Background

Petitioners are a husband and wife team who claim to have supernatural powers including painting and writing about events prior to their occurrence; for example, Petitioners claim to have predicted the September 11, 2001 attack on the World Trade Center. Petitioners' complaint alleged that defendants' television series *Heroes* infringes three different creative works authored by Petitioners: a short film, a semi-autobiographical novel entitled *The Twins: Journey of the Soul* ("*Journey*"), and a series of paintings. Only the novel was registered for copyright protection.

Petitioners' novel is a hand-transcribed, unpublished, 777-page work that the district court described as "sprawling and mystical" in tone. The district court further described it as an "undifferentiated stream of description and dialogue without guiding punctuation [which] shifts repeatedly between various settings, including Louisiana, Cuba, Miami, Texas, Africa, Paris, New York and more ethereal realms." The subplots of *Journey* are complex and densely populated, and involve, *inter alia*, supernatural elements, celestial conflicts between divinities, drug warfare, and ritual killings. In the novel, one of the characters creates paintings and sketches of future events.

By contrast, as described by the district court, Respondents' television show *Heroes* is "an hour-long, weekly television drama about ordinary people who discover that they possess unexpected powers, and the complications, adventures and dangers that follow". The overall tone of the show

is serious, but there are comedic elements, and the narrative is typically fast-paced. As the court noted, *Heroes* has been compared to a televised graphic novel or comic book: the series is not only structured like a comic book, it also contains thematic elements further tying it to that genre.

Petitioners' complaint alleged that certain elements are common to plaintiffs' works and *Heroes*: a minority artist who paints the future on large-scale oil-on-canvas paintings, including two landmark New York buildings being destroyed, which he attempts to stop; a depiction of a bus exploding, which is "validated" by news media; and the use of cosmograms, eclipses, twin characters, New York City, characters from Texas, global genetic changes, and close up eye images. Based on these scattered, alleged similarities in ideas, Petitioners claimed copyright infringement.

B. The Decisions Below

1. *The District Court Proceedings*

NBC filed a motion to dismiss in the district court pursuant to Fed. R. Civ. P. 12(b)(6), arguing that a comparison of the allegedly infringed and infringing works referenced in the complaint showed no substantial similarity of protectable expression. On December 3, 2007, the district court issued its decision, converting NBC's motion to dismiss into a motion for summary judgment pursuant to Fed. R. Civ. P. 56, and dismissing all of plaintiffs' claims. *Mallery v. NBC Universal, Inc.*, No. 07 Civ. 2250, 2207 WL 458196 (S.D.N.Y. Dec. 3, 2007), *aff'd*, 331 Fed. Appx. 832 (2d Cir. 2009).

The district court found that the works at issue are not substantially similar because "nearly every instance of alleged similarity between *Heroes* and the plaintiffs' work relates to unprotectable ideas rather than protectable expression". (*Id.* at *6.) The court reached this result through a careful analysis and comparison of the parties' respective works. (*Id.* at *6-9.) The court analyzed all of the similarities plaintiffs had identified and determined that regardless of whether these alleged similarities were viewed separately or in the aggregate as part of the overall "total concept and feel, theme, characters, plot, sequence, pace and setting" of the works, there was no actionable similarity. (*Id.*)

The court first addressed plaintiffs' primary assertion that *Heroes* was substantially similar to *Journey* because of alleged similarities between characters in each work who can "paint the future". The court found each of the allegedly similar elements to be similar at the level of idea only, and that most of these alleged similarities were unprotectable scènes à faire. (*Id.* at *6-7.) The court also compared the "total perception" of the two characters, finding that they "could hardly be more different". (*Id.*) The district court found that plaintiffs' litany of other alleged similarities were also merely unprotectable ideas, and that there was no similarity of expression in the characters, plot, mood, structure and style of the works. (*Id.* at *7.) The Court held that once "beyond th[e] level of abstraction", any alleged similarity between the works disappeared, because they were "not similar in mood, details, characterization, and, indeed, differ in nearly

every relevant way", and because those works have substantially different context, plot lines, narrative structure, and style. (*Id.* at *8.)

Although defendants moved to dismiss the complaint pursuant to Rule 12(b)(6), the district court found that "in light of the arguments presented, [the] motion is properly treated as a motion for summary judgment" (*Id.* at *2, *citing Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 108 (2d Cir. 2001)). The arguments raised before the district court were "focused almost exclusively" on the questions of "whether the alleged similarities relate to noncopyrightable elements and whether any reasonable observer could consider the works substantially similar". (*Id.*) The court observed that while notice to the parties is ordinarily required, the parties in this case should have reasonably anticipated that the motion might be converted given the arguments raised and, perhaps most importantly, that neither party had been or could be prejudiced by the conversion, because the works in question were the only documents necessary to be reviewed in order to resolve the motion. (*Id.*)

On March 18, 2008, the district court granted NBC's motion for prevailing party attorneys fees pursuant to 17 U.S.C. § 505, and awarded NBC $99,106.45. This award is not the subject of the instant petition.

2. *The Court of Appeals Decision*

On June 3, 2009, the Court of Appeals for the Second Circuit issued a Summary Order affirming the decisions of the district court. *Mallery v. NBC Universal, Inc.*, 331 Fed. Appx. 821 (2d Cir. 2009).

In its Order, the Court first addressed the conversion of Respondents' motion into a motion for summary judgment, citing *Gurary v. Winehouse*, 190 F.3d 37, 43 (2d Cir. 1999) for the proposition that although a court "generally should give parties specific notice of its intent to convert a motion to dismiss into a motion for summary judgment, specific notice is not required in all circumstances". *Id.* at 822. It held that "[t]he essential inquiry is whether the appellant should reasonably have recognized the possibility that the motion might be converted into one for summary judgment or was taken by surprise and deprived of reasonable opportunity to meet facts outside the pleadings". *Id.* (internal quotation marks omitted). The Second Circuit concurred with the district court's determination that, in the instant case, Petitioners (who were represented by counsel) should have reasonably anticipated conversion and were not prejudiced by same, because the works in question were before the Court. *Id.*

The Court of Appeals then affirmed on the basis that "[s]ummary judgment was appropriate in this case because no reasonable jury could find that there was substantial similarity between Defendants' television series, *Heroes*, and the original, protectable elements of Plaintiffs' works." *Id.* at 822-23. It further specifically held that "[t]he few and isolated similarities that Plaintiffs have identified are unprotected ideas or scènes à faire." *Id.*

C. Petitioners' Additional Submissions To The Court Of Appeals

Petitioners filed a Petition for Re-Hearing *en banc* on June 17, 2009. They then filed several applications for permission to submit additional

written materials in connection with that Petition. The additional materials consisted of an assortment of newspaper articles and some material from the record below, both annotated with plaintiff's handwritten comments in the margins. These materials were apparently submitted on the issue of access, which had been conceded for the purposes of defendants' motion. The first was granted by the Court of Appeals on June 16, 2009; the second was granted on July 6, 2009, but the Court stated that no further applications for supplementation would be entertained.

Petitioners thereafter filed an application in the Court of Appeals for an emergency injunction seeking to compel NBCU to remove Petitioners' likenesses and names from a website owned not by NBCU, but by a third party. Petitioners also filed a request for permission to submit additional written materials in connection with their application for an emergency injunction. The application for an emergency injunction was denied by the Court of Appeals as moot on September 9, 2009. That order does not appear to be a subject of the instant petition.

D. Petitioners' Mischaracterizations of the Facts and the Record Below

Rule 15 of the Rules of the Supreme Court states that "the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted". Here, the Petition is replete with outright falsities concerning both the underlying facts and the proceedings below.

First, Petitioners restate the allegations of the Complaint and characterize them either as findings of the district court or as facts that were not in dispute. For example, they state that NBC representatives attended an art exhibit and film screening where Petitioners' work was available, and "took the petitioners [sic] copyrighted IP" and used it to create an infringing character (Petition, pp. 3, 10), and separately that Respondents do not dispute that NBC representatives attended the exhibit and screening and "accessed and copied" Petitioners' work (Petition, p. 10-11). They also state that "[t]he respondents . . . admitted to using the artist that can paint the future and artwork in the pilot script as a sale device to pitch 'Heroes' to NBC network." (Petition, p. 17.) The district court made no such findings, and NBCU denies these allegations; as noted, it did concede access solely for the purpose of its motion to dismiss.

Second, Petitioners not only improperly disclose privileged settlement communications, they misstate the substance of those discussions. For example, Petitioners state that NBCU through its counsel made a settlement offer of a specific dollar amount on May 7, 2007. (Petition, p. 3.) NBCU never offered any money to Petitioners. Respondents strenuously object to the disclosure of settlement communications to this Court, and to Petitioners' wholesale fabrication of the contents of such communications.

Third, Petitioners cite to materials submitted in connection with their Petition for Re-Hearing *en banc* in the Court of Appeals and in connection with their request for an emergency injunctions in that same Court, as if those materials were part of

the record before the district court, or are admitted facts. For example, based upon this material Petitioners state that Tim Kring "admitted" copying or "guilt" publicly (Petition, pp. iii, 11, 18); and that a website owned by a third party upon which NBCU advertisements for *Heroes* merchandise appear uses "petitioners [sic] likeness from a New York Daily newspaper article. . . ." (Petition, pp. 17-18.) Petitioners assert that the Court of Appeals "ignored" this "evidence." (Petition, p. 9.) This is simply false, as those submissions were not based on any evidentiary material proferred in the trial court, and regardless, as noted above, the Court of Appeals accepted and reviewed Petitioners' submissions but rejected the arguments contained therein, denying both the Petition for Re-Hearing *en banc* and the request for an injunction, as moot. Respondents object to Petitioners' attempt to place these materials before this Court as "facts" in the record below. Further, review of those materials demonstrates that Mr. Kring did not admit copying Petitioners' (or anyone's) copyrighted works (Petition, Appendix O).

Finally, Petitioners appear to be alleging a RICO claim under 18 U.S.C. 1343 (Petition, p. 19), but this claim was not raised either in the district court or the Court of Appeals, and has no basis in law or fact.

REASONS FOR DENYING THE PETITION

Petitioners' petition for writ of certiorari fails to present either a split in the Circuit Courts or an important issue of federal law that requires this Court's review of the decision below. The Court of Appeals in this case affirmed a summary judgment dismissing Petitioners' copyright infringement claim that was fully supported by a careful comparison and analysis of the parties' respective works by the district court, under the applicable standards, most significantly the fundamental copyright tenet that only protectable elements of a plaintiff's work are relevant to the substantial similarity analysis. *See, e.g.s., Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 548 (1985); *see also Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir. 1986); *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F. 2d 1157, 1162-63 (9th Cir. 1997). The Court of Appeals properly affirmed, concluding that summary judgment was appropriate because no reasonable jury could find that there was substantial similarity between the parties' respective works.

Petitioners argue that there is a Circuit split, citing the Ninth Circuit Court of Appeals decision in *Twentieth Century Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327 (9th Cir. 1983) and the Sixth Circuit Court of Appeals decision in *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267 (6th Cir. 2009).

However, in *Twentieth Century Fox*, the Ninth Circuit merely found, after a review of the works in question, that the question of substantial similarity between the works was "a close enough

question that it should be resolved by way of a trial". The Ninth Circuit made clear that its decision in the case did "not imply that summary judgment is never appropriate in copyright infringement actions", and allowed that "summary judgment for defendant is appropriate where works are so dissimilar that a claim of infringement is without merit". 715 F.2d at 1329-1330. That was precisely the case here. Indeed, the district court found that there was "profound dissimilarity" between the works, such that Petitioners' claims were objectively unreasonable, warranting an award of attorneys fees. *Mallery v. NBC Universal, Inc.*, No. 07 Civ. 2250, 2008 WL 719218, *2 (S.D.N.Y. Mar. 18, 2008), *aff'd*, 331 Fed. Appx. 821 (2d. Cir. 2009). Far from constituting a Circuit split, the decision in instant case and *Twentieth Centrury Fox* are fully consistent.

Also consistent is *Bridgeport Music*, a Sixth Circuit decision which Petitioners cite in part for the proposition that "fragmented literal similarity" may be the basis for a claim of copyright infringement here (Petition, pp. 15-17). The concept of "fragmented literal similarity", which is recognized by the Second Circuit as well, simply does not apply in this case, where the "scatter-shot" similarities asserted by Petitioners did not include any text (or graphics) that were literal reproductions, but rather vague themes, scenes a faire, and the like. *Bridgeport Music*, 585 F.3d at 275 ("random similarities scattered throughout the works are not a proper basis for a finding of substantial similarity" (citations and quotations omitted)). Petitioners also cite *Bridgeport Music* for its discussion of fair use (Petition, pp. 11-12),

but NBCU did not assert fair use as a defense in connection with its motion to dismiss, nor did the district court dismiss the action on that ground. Thus there is no split between the Second and Sixth Circuits on either point.

Petitioners have not presented any reason to overturn longstanding law and find summary judgment inappropriate here. While Petitioners argue that Court of Appeals should have rejected the district court's finding that the character Isaac in NBCU's television program was not substantially similar to the character Idai in Petitioner's novel, the district court carefully analyzed Petitioners' claim that both characters could "paint the future", and found that the concept of painting the future was a mere idea, and unprotectable. The district court found instead that the total perception of the two characters could hardly be more different. Nor does Petitioners' claim that Idai was based on Petitioner Clifton Mallery's real-life persona (*e.g.*, Petition, p. 18) alter that analysis in any way.

Petitioners also argue that the grant of summary judgment "without notice" was error, presumably referring to the conversion of Respondents' Rule 12(b)(6) motion into a motion for summary judgment. A district court's authority to convert a motion to dismiss into one for summary judgment pursuant to Rule 12(d) in appropriate cases is clear and settled. The Petition thus does not raise an important issue of federal law or an issue that is the subject of a Circuit split, on this basis. As the Second Circuit held, while preferred, specific notice of conversion is not required in all circumstances, especially where "the appellant

should reasonably have recognized the possibility that the motion might be converted into one for summary judgment" and is not "taken by surprise and deprived of reasonable opportunity to meet facts outside the pleadings." *Gurary*, 190 F.3d at 43. As stated in *Cortec Industries, Inc. v. Sum Holding LP*, 949 F.2d 42, 47 (2d Cir. 1991):

> A finding that plaintiff has had notice of documents used by defendant in a 12(b)(6) motion is significant since . . . the problem that arises when a court reviews statements extraneous to a complaint generally is the lack of notice to the plaintiff that they may be so considered; it is for that reason—requiring notice so that the party against whom the motion to dismiss is made may respond—that Rule 12(b)(6) motions are ordinarily converted into summary judgment motions. Where plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint the necessity of translating a Rule 12(b)(6) motion into one under Rule 56 is largely dissipated.

Here, the only materials the court considered on the motion were incorporated in the complaint by reference (that is, the infringing and infringed works themselves). The courts below were therefore correct in finding that Petitioners were not deprived of an opportunity to meet facts outside the pleadings and could not have been surprised or prejudiced.

Whether on motion to dismiss or on motion for summary judgment, it is entirely appropriate for a court to make a determination of infringement or lack thereof as a matter of law, based solely on a comparison of the works in question, assuming access has been conceded for the purposes of the motion, as it was here. *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 977-80 (2d Cir. 1980); *see also Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 US 340 (1991) (reversing grant of summary judgment to plaintiff and finding that defendant's work was not infringing where it only reproduced unprotected facts). This is especially true where the alleged similarities concern only unprotectable elements of the allegedly infringed work, as the district court correctly found here. *See Walker v. Time-Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir. 1986). Here, because the arguments raised before the district court were "focused almost exclusively" on the questions of "whether the alleged similarities relate to noncopyrightable elements and whether any reasonable observer could consider the works substantially similar", the district court found it appropriate to treat the motion as one for summary judgment and decide substantial similarity as a matter of law. The Court of Appeals properly affirmed.

CONCLUSION

The petition for a writ of certiorari should be denied because it presents neither a split in the circuit courts nor an important issue of federal law that requires this Court's review. There is no reason to delay consideration of the petition, and it should be promptly denied.

Respectfully submitted.

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